IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 819 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOMIN SUMAR

Versus

STATE OF GUJARAT

Appearance:
MR KJ SHETHNA for Petitioner
MR KC SHAH, APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE C.K.BUCH

Date of decision: 20/06/2000

ORAL JUDGEMENT (PER : C.K.BUCH, J)

This appeal is preferred by the appellant-convict accused no.1 against the judgment dated 18.7.1990 passed by the learned Sessions Judge, Amreli in Sessions Case No.61/88, whereby the appellant- accused no.1 came to be

convicted for the offence punishable under sec.302 of the Indian Penal Code (hereinafter referred to as the "IPC") and was sentenced to suffer R/I for Life. Along with appellant accused, three other accused also came to be tried for the offence punishable under sec.302, R/w Sec.34 and/or 114 of the IPC. However, vide impugned judgment, rest of the accused came to be acquitted.

2. To appreciate the case of the present appellant, we would like to narrate in brief the prosecution case. According to the case of the prosecution, on 21.5.1988, at about 12.30 P.M., when deceased Balubhai was proceeding for hiring a tractor of one Vallabhbhai of village Dungar, appellant -accused no.1 intervened Balubhai near the entrance of Kohinoor Cinema and both accused nos. 1 & 2 gave knife blows on the chest, stomach and waist to the deceased and accused nos. 3 & 4 abetted accused nos. 1 & 2 in commission of the said crime. According to the case of the prosecution, accused no.1 gave two knife blows on the body of deceased; one on the waist and another on the right arm. After assault, accused persons ran away and relatives of deceased took the deceased to the Community Health Centre, Dungar from where he was shifted to Mahuva Hospital where he succumbed to injuries. Motive is also specifically pleaded by the prosecution. It is the say that inter-se quarrel had occurred prior to 10 to 15 days of incident between accused no.1 and first cousin of deceased Balubhai and the same brought enmity between them. According to the prosecution, accused no. 1 was insisting that the parties should settle said dispute out of court by arriving at a compromise. This animosity instigated appellant and other accused to assault the deceased. Injured Balubhai had sustained six different injuries on the various parts of the body, out of which, two of them were individually and collectively sufficient in ordinary course of nature to cause death of the injured. After examining 16 witnesses and after appreciating documentary evidence led by the prosecution, learned Sessions Judge, by the impugned judgment, convicted present appellant for the offence punishable under sec.302 of the IPC and sentenced him to suffer R/I for Life and acquitted rest of the accused persons. We are told that respondent State has not preferred any acquittal appeal against rest of the accused persons who came to be acquitted by the impugned judgment.

3. Mr. K.J.Shethna, learned Senior Counsel appearing for the appellant has taken us through the entire set of evidence, oral as well as documentary, and has pointed out that at the initial stage, all the

accused were charged for the offence punishable under sec.302, R/w Sec.34 and/or 114 of the IPC. He has pointed out that the present appellant was not charged individually for the offence punishable under sec.302 of IPC. He has also submitted that it is not the case of the prosecution from the beginning that the present appellant is responsible for the injuries which ultimately proved to be fatal. After perusal of various panchanamas including recovery panchanama of blood stained clothes of the appellant accused (exh.31) and blood stained knife (exh.33), and the case of the prosecution reflected in important documents namely FIR (exh.46) and Dying Declaration (hereinafter referred to as the "DD" for short) of deceased Balubhai (exh.25), learned Senior Counsel Mr. Shethna appearing for the appellant has submitted that there is no sufficient evidence to connect the present appellant with the offence punishable under sec.302 of IPC. According to Mr. Shethna, the prosecution has examined two eye-witnesses viz. P.W.5 Chhagan Dana (exh.28) and P.W.6 Vasant Popat (exh.29). P.W.6 Vasant Popat is declared hostile and has not supported the case of the prosecution. The case of the prosecution rests only on (i) DD, (ii) FIR and (iii) oral version of P.W.5 Chhagan Dana (exh.28). Mr. Shethna has drawn our attention to various contradictions and improvements made by P.W.5 Chhagan Dana and has submitted that this witness is wholly unreliable witness and he must not have seen incident. This witness is the only witness who has named accused no.2 for the first time before the police and his presence at the scene of offence was highly unnatural and can be termed as a chance witness. Hence, prosecution cannot seek any assistance from the oral evidence of this witness Chhagan Dana. Careful scrutiny of the evidence of this witness Chhagan Dana reveals that he is a highly interested witness being a caste fellow and a distant relative of the deceased. So, Mr.Sethna assailed the entire case of the prosecution and false implication of accused nos. 3 & 4 in the case. Mr. Shethna has submitted that the alleged FIR lodged by deceased Balubhai before Head Constable of Mahuva Police Station is the first document which throws light on the case of the prosecution. Case initially in the FIR clearly indicates that only two persons were assailants and the present appellant was one of them. Accused no.2 is undoubtedly resident of village Dungar and it is not the case of the prosecution that deceased Balubhai was not able to identify accused no.2 even though he was of the same village. According to FIR, one stranger, unknown and unidentified person, was accompanying appellant -accused no.1 and appellant gave knife blows to the

deceased. According to the version in FIR, present appellant had given two knife blows; one of which was on the right arm and second one on the waist portion of the body of the deceased. When FIR was recorded by the Police Constable, deceased Balubhai was conscious and he narrated the entire incident. FIR was registered at Mahuva Police Station as "O" Offence as per the practice followed by the police stations in the State of Gujarat and later on crime was investigated by PSI, Mahuva having jurisdiction over the area wherein village Dungar is situated. In couple of hours of filing of FIR, Executive Magistrate recorded DD of deceased Balubhai and in that DD, deceased gave different version. According to Mr. Shethna, deceased made various improvements. He introduced two other persons as accused and had narrated present appellant as accused no.3 in sequence during narration of the names of assailants. According to Mr. Shethna, name of accused no.2 was not even reflected in the DD. He has vehemently submitted that induction of accused no.2 by P.W.5 Chhagan Dana shows that witness Chhagan Dana is highly interested person and his testimony should not be used as a corroborative piece of evidence. He has also submitted that in light of the principles propounded by the Apex Court in catena of decisions, conviction can not be based on any one of the DDs when two DDs are conflicting and not corroborating each other satisfactorily. According to Mr. Shethna, trial Court ought not to have convicted the present appellant by holding that the improved version of deceased Balubhai in DD recorded by the Executive Magistrate, is doubtful, the veracity of this witness and his statement before the police (FIR), also cannot be viewed with any trust or content. So, in the first fold of his arguments, learned Senior Counsel Mr. Shethna has submitted that present appellant should be acquitted for the offence for which he has been charged and held guilty. During the course of submissions, in response to the queries raised by us, Mr. Shethna has alternatively submitted that as the present appellant was not charged specifically and individually for the offence punishable under sec.302 of IPC, in absence of cogent evidence as to the guilt of the present appellant, present appellant at the most can be held responsible under the principles of minimum liability as there is no evidence to show that the present appellant had inflicted fatal blows on the person of the deceased. Mr. Shethna has taken us through medical evidence and Post Mortem Notes (exh.22). P.W.2 Dr. Bhanushankar Joshi (exh.21) who performed post mortem on the body of the deceased, has categorically stated that out of six injuries, two injuries were fatal. He has narrated those fatal injuries as injury nos. 1 &

2 in his deposition. We would like to reproduce the injuries found on the body of the deceased at the time of post mortem. They are as under :-

(1) Transverse sutured wound situated 6" below right nipple, 3" in length at right hypochondrium.

(2) Transverse sutured wound 2" below injury no.1, size 1" length in right hypochondrium.

(3) Transverse sutured wound over right posterior auxillary line lower part of chest 1" long in right 7th inter-costal space.

(4) Oblique sutured wound on back of the abdomen just to the right side of middle plane 1" long at the level of 2nd lumber vertebra.

(5) Vertical sutured wound over posterior aspect of rigor 1/3rd part of right forearm 2" long.

(6) Oblique incised wound over posterior aspect of right forearm lower 1/4th part size 1" x 1/4" x muscle deep.

Corresponding internal injuries are also narrated by the doctor.

4. After reading the evidence of medical officer, certificate issued by the doctor who had examined the deceased at the initial stage, we are satisfied that there is some strength in the argument advanced by Mr. Shethna that there is no cogent evidence on record to show that the present appellant was responsible for inflicting any of these two injuries which are proved to be fatal. It is not even the say of P.W.5 Chhagan Dana that he had seen present appellant inflicting knife blows on a particular part of the body. Even deceased Balubhai has not stated that injuries on the upper part of stomach or on the chest was inflicted by the present appellant in DD or FIR. On the contrary, if we read FIR as it is, deceased Balubhai had attributed only two blows to the present appellant which can be said to be specific attribution. According to the deceased, one of the injury was inflicted on the right hand and second one was on the waist. For the sake of arguments, if this version is accepted as it is, even then it can legitimately be inferred that the present appellant had not selected any vital part of the body while inflicting injuries on the body of the deceased. Submission of Mr. Shethna,

therefore, is that in absence of sufficient and cogent evidence as to which injury was caused by whom and in absence of any evidence on record connecting present appellant with injury nos. 1 & 2, appellant cannot be held guilty for the offence punishable under sec.302 of IPC and at the most, he can be held guilty for the offence punishable under sec. 324 of IPC only. He has pointed out that case against the present appellant cannot be brought within the purview of offence punishable under sec.326 of IPC. On plain reading of certificate of injury, we are satisfied that no injury other than injury nos. 1 & 2 can be said to be grievous of nature which may attract the provisions of sec. 326 of IPC. The prosecution has tried to establish guilt against all the accused by examining one eye witness namely P.W.6 Vasant Popat (exh.29), but as stated earlier, he has not supported the case of the prosecution. Prosecution has proved various contradictions by asking pointed questions during the cross-examination of this witness and these contradictions are proved by putting specific questions to the Investigating Officer who recorded the statement of this witness. However, the evidence which is brought on record by way of proving contradictions, cannot be treated as a substantive and independent piece of evidence and the same will not help the prosecution as per the settled legal position. It is also important to note that during the course of investigation, two blood-stained cloths were recovered, out of which, one was recovered from the present appellant. Ld. APP Mr. Shah has rightly pointed out that knife allegedly recovered from the present appellant was ultimately found blood stained during the examination by Forensic Science Laboratory. Though the blood group on the knife is not ascertainable, during the serological examination, FSL found that the blood on the knife was human blood. Panch witness examined by the prosecution who has proved panchanama of recovery of knife and cloths of the present appellant belongs to the community of the deceased. However, it has been rightly submitted that this panch witness has tried to support the prosecution case and there is no material discrepancy in the evidence of this witness. But this evidence would not carry prosecution any further to link the accused with the crime punishable under sec. 302 of IPC. Mr. Shah has submitted that the case of the prosecution as to the presence of P.W.5 Chhagan Dana at the place of incident is consistent and his name is also reflected in FIR as well as in DD. So, deceased Balubhai was consistent in his say that when incident had occurred, P.W.5 Chhagan Dana was present. Hence, it can legitimately be inferred that irrespective

of the role played by the present appellant, presence of the present appellant at the scene of offence is satisfactorily established by the prosecution. We have no reason to disbelieve two consecutive statements of deceased Balubhai wherein name of the present appellant is reflected. We agree that to some extent, P.W.5 Chhagan Dana corroborates the prosecution case, and at least to that limited extent the case of the prosecution can be accepted. It is human conduct that person interested in a case, may implicate more persons in crime, but while doing so,normally, he would not leave the real culprit. It seems that even while implicating two other persons at the time of narrating incident before the Executive Magistrate, deceased Balubhai did refer the name of the present appellant. Even if we ignore DD recorded by the Executive Magistrate as a reliable piece of evidence, this Court can positively accept the case reflected in FIR which can also be termed as DD recorded by the police official to hold that the case of the prosecution is consistent so far as role played by the appellant that he has inflicted two knife blows on the body of the deceased. Knife which was sent to FSL was also recovered in presence of panchas within reasonable period of time. The cloths of the present appellant which were sent to FSL, were not found blood-stained, but this would not help the the defence side in light of recovery of blood stained knife from the appellant accused. It seems that the person who had remained unidentified, must have caused serious injury on the body of the deceased. It is not the charge against the present appellant that he shared common intention with unidentified person or a stranger to kill the deceased. There is some evidence of animosity between the family of the accused and family of the deceased, but this is a double-edged weapon. Mr. Shethna has rightly argued that tendency to involve maximum number of family members or relatives of the present appellant has

affected adversely to the case of the prosecution. However, when there is sufficient evidence as to the presence of the present appellant at the scene of incident and some role played by him, we are not inclined to accept that he was falsely implicated as there were inimical relations between the parties and that some unknown persons having enmity with the deceased, had inflicted all the blows on the deceased. We accept submission of Mr. Shethna that in absence of specific charge against the appellant that he had individually committed offence punishable under sec.302 of IPC and in absence of evidence that who had inflicted fatal blows to

the deceased and also in absence of a charge that present appellant shared common intention with the stranger or unidentified person or he had abetted stranger in committing murder of the deceased, principles of minimum liability would be attracted and the present appellant cannot be held guilty of the offence punishable under sec.302 of IPC.

5. Thus, the question before us is for what offence, present appellant should be held guilty if he is not held guilty of the offence punishable under sec.302 of IPC ? As observed, the appellant accused cannot be punished for the offence punishable under sec.326 of IPC in absence of medical evidence to that effect as deceased himself has stated at the initiation of the proceedings that the present appellant had given knife blows on the waist and right arm of the deceased and both the injuries which are recorded in the medical certificate and Post Mortem Notes, are simple in nature. Under the circumstances, it can be safely held that appellant can be held guilty of the offence punishable under sec.324 of IPC as these two injuries, though are simple in nature, though caused with a dangerous weapon like knife. Hence, it is held that appellant is guilty of offence punishable under sec.324 of IPC instead of offence punishable under sec.302 of IPC as held by the learned Sessions Judge. Consequently, submissions made by Mr. Shethna to acquit the appellant, are hereby rejected.

6. We are told that the appellant accused was undertrial and at present undergoing sentence of imprisonment since for more than about 10 years. Hence, if we inflict sentence of R/I for 3 Years on the appellant accused for the offence punishable under sec.324 of IPC, that would meet the ends of justice. We would have also imposed sentence of fine on the appellant accused, but in view of the period for which the appellant had remained in jail pending this appeal, we are not imposing sentence of fine.

7. For the foregoing reasons, appeal is partly allowed. Impugned judgment dated 18.7.1990 passed by the learned Sessions Judge, Amreli in Sessions Case No. 61/88 convicting present appellant- original accused no.1 for the offence punishable under sec.302 of the I.P.Code and sentencing him to suffer R/I for Life, is hereby quashed and set side and instead the appellant accused is convicted for the offence punishable under sec.324 of the I.P.Code and is sentenced to suffer R/I for 3 Years. In view of the fact that accused is undertrial and is in jail since last more than about 10 years, no order

imposing fine is passed. While computing sentence, period spent in jail by the appellant-accused, be given set off.

DT; 20.6.2000 (K.R. VYAS, J)

(C.K. BUCH, J)
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